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No. 93-1142

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MEMPHIS POLICE DEPARTMENT, *et al.*,
Petitioners,

v.

CLEAMTEE GARNER,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF IN OPPOSITION

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

After 18 years, and three appearances before the Court of Appeals, Petitioners now seek a second review by this Court of this wrongful death action. *See, Tennessee v. Garner,* 471 U.S. 1 (1985). In 1985 this Court affirmed the Sixth Circuit's ruling pertaining to the fleeing felon rule and held that the common law fleeing felon rule -- which authorized police to use deadly force to prevent the escape of fleeing felony suspects -- violated the Fourth Amendment. The case was remanded to the district court for resolution of the issues raised by *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978), and there it languished.

On remand, plaintiff filed a motion for partial summary judgment against the city under *Monell,* (June 23, 1986). On August 21, 1991, defendants filed a supplemental response to plaintiff's motion for partial summary judgment citing *Carter v. City of Chattanooga,* 850 F.2d 1119 (6th Cir. 1988) *(en banc), cert. denied,* 488 U.S. 1010 (1989). On June 30, 1992 the district court denied plaintiff's motion for summary judgment, and granted summary judgment in favor of defendants, holding that under *Carter,* this Court's ruling in *Garner* should not be applied retroactively to the parties. The court then dismissed the case. Plaintiff filed a timely appeal, challenging the grant of summary judgment in favor of the defendants and the denial of plaintiff's motion for summary judgment.

Based on the uncontroverted facts in this case, as set forth in the Sixth Circuit opinion[1], and consistent with this Court's holdings in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978), and *Tennessee v. Garner,* 471 U.S. 1 (1985), the Court of Appeals expressly reversed the district court's grant of summary judgment in favor of the defendants and its denial of plaintiff's partial summary judgement motion, holding *inter alia,*

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[1] In its attempt to seek a *de novo* review of this case the Petitioner asserts that the officer could not tell whether the deceased was armed; was fearful that if young Mr. Garner escaped there would be "little opportunity of identification" for purposes of future arrest; and suggests that the officer did not know that Garner was only fifteen years old and unarmed at the time of the fatal shooting. (Pet. 4-5) The Court of Appeals opinion makes plain however that the officer ". . . could see that the fleeing felony [sic] was a youth and was apparently unarmed"; that, ". . . the officer fired at the upper part of the body, as he was trained to do by his superiors at the Memphis Police Department"; and that the officer shot, ". . . because he believed the boy would elude capture in the dark once he was over the fence." (Appendix to the Petition, A7)

> This circuit has stated that to satisfy the *Monell* requirements a plaintiff must 'identity the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.' *Coogan v. City of Wixom*, 820 F.2d 170, 176 (6th Cir. 1987) (adopting the test articulated in *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984) (*en banc*), *cert. denied*. 472 U.S. 1016 (1985)). Plaintiff has met this standard.

Garner v. Memphis Police Depart., (Pet. App., A14-15)[2]

The Sixth Circuit specifically remanded this case "with directions that the district court enter an order of partial summary judgment in favor of the plaintiff on the issue of liability", *Garner v. Memphis Police Depart.*, (Pet. App., A21). The Court of Appeals subsequently denied the petition for rehearing en banc or by the panel, and the defendants filed this petition.

REASONS FOR DENYING THE WRIT

The principle issues raised by this petition are (1) whether the rule of *Tennessee v. Garner*, 471 U.S. 1 (1985), will be applied to the very case that laid down the rule; (2) whether the police officer's dismissal from the case because he was protected by the doctrine of qualified immunity, similarly entitles these municipal defendants to exoneration for the constitutional injury suffered by Mr. Garner; and (3) whether the court below correctly applied the *Monell* standard to the undisputed facts. These issues are all well-settled.

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[2] Citations in this form refer to the appendix to the petition.

(1) Petitioners argue that *Garner* should not be applied retroactively in the very case that established the rule. This argument is foreclosed by this Court's recent holding in *Harper v. Virginia Department of Taxation,* 509 U.S. ---, 125 L.Ed.2d 74, 113 S.Ct. ---, (1993), which is controlling. There, this court held that when the Court does not reserve the question whether its holding should be applied to the parties before it, the opinion is properly understood to have followed the normal rule of retroactive application, ". . . that its rule should apply retroactively to the litigants then before the Court." *Id.,* at 125 L.Ed.2d 86-87, quoting *James B. Beam Distilling Co. v. Georgia,* 501 U.S. ---, 115 L.Ed.2d 481, 111 S.Ct. 2439 (opinion of Souter, J.). Moreover, this Court also held that "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper,* 125 L.Ed.2d at 86.

Just as this Court relied on *Beam,* in reaching its decision in *Harper,* so too did the Sixth Circuit rely on *Beam,* in its holding below:

> The *Beam* court held unanimously that *Bacchus'* silence on the retroactivity issue indicated that the Court intended to follow the usual practice of applying its decision to the parties before it.

Garner v. Memphis Police Depart. (Pet. App., A12)

The district court's opinion and the petition each rely upon a retroactivity analysis that was rejected by this Court

in *Beam* and *Harper*.[3]

(2) Petitioners' reliance on *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), for the proposition that the successful assertion of qualified immunity, by an individual actor, absolves a municipality of liability, is similarly unavailing. In *Heller*, this Court held that a finding that the officer did not commit a constitutional violation precluded a claim against the city that its policy was responsible for the officer's action. Here the constitutional violation has been clearly and repeatedly established, notwithstanding the officer's successful assertion of qualified immunity.

> In the instant case there is no doubt that a constitutional violation occurred. 'A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.' *Tennessee v. Garner*, 472 U.S. at 11. The district court's holding to the contrary was overturned by this court, and the Supreme Court affirmed.

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[3] Both the district court and Petitioners rely on *Carter v. City of Chattanooga, Tenn.*, 850 F.2d 1119 (6th Cir. 1988) *(en banc), cert. denied*, 488 U.S. 1010 (1989), for the proposition that this Court's holding in *Garner* should not be applied to the litigants in *Garner*. *Carter*, in turn, relies on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to support the non-retroactive application of *Garner* to a case in which the events predate the announcement of the rule of *Garner* while the decision postdates *Garner*. Whatever relevance *Carter* or *Chevron* may have had to the case at bar is clearly extinguished by this Court's holding in *Harper*, that, " '. . . to apply a rule of federal law retroactively after the case announcing the rule has already done so' must 'prevai[l] over any claim based on a *Chevron Oil* analysis.'" *Harper*, 125 L.Ed.2d at 87, (quoting opinion of Souter, J., *Beam*, 115 L.Ed.2d 481).

> *Garner II,* 710 F.2d 240; *Tennessee v. Garnery,* [sic], 471 U.S. 1.

Garner v. Memphis Police Depart., (Pet. App., A18)

A municipality is not entitled to the shield of qualified immunity from liability under 42 U.S.C. § 1983, nor may it "assert the good faith of its officials or agents as a defense to liability under § 1983." *Owen v. City of Independence,* 445 U.S. 622, 638 (1980); *see also, Brandon v. Holt,* 489 U.S. 464 (1985).[4]

(3) The Sixth Circuit's clear statement of the proper standard established by this Court's decision in *Monell,* is not challenged by the Petitioners. (Petition at 9)

> This circuit has stated that to satisfy the *Monell* requirements a plaintiff must 'identity the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.' *Coogan v. City of Wixom,* 820 F.2d 170, 176 (6th Cir. 1987) (adopting the test articulated in *Bennett v. City of Slidell,* 728 F.2d 762, 767 (5th Cir. 1984) (*en banc*), *cert. denied.* 472 U.S. 1016 (1985)). Plaintiff has met this standard.

Garner v. Memphis Police Depart., (Pet. App., A14-15).

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[4] *See, Doe v. Sullivan County, Tenn.,* 956 F.2d 545, 554 (6th Cir.), *cert. denied,* 113 S.Ct. 187 (1992). The petitioner's reliance on the district court's opinion in *Rodriguez v. City of Passaic,* 730 F.Supp. 1312 (D.N.J. 1990), *aff'd.,* 914 F.2d 244 (3rd Cir. 1990), ignores the fact that *Rodriguez* specifically relies on the reasoning of *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971) and *Carter v. City of Chattanooga, Tenn.,* 850 F.2d 1119 (6th Cir. 1988) *(en banc), cert. denied,* 488 U.S. 1010 (1989), which were rejected by this Court in *Harper.*

Rather, the Petitioners seek alternative factfinding on the question whether Memphis Police Department General Order 5-74(3)(b)(3)[5] constitutes a "policy or custom" of the Memphis Police Department, "authorizing use of deadly force when necessary to apprehend a fleeing burglary suspect." (Pet A.15). Curiously, while Petitioners make this argument at page 10 of their petition, they concede at page 12, that Officer Hymon was "following established police department policy." The facts surrounding the adoption of the Memphis deadly force policy are undisputed. Based on this record the Court of Appeals has twice determined the existence and effect of the Memphis deadly force policy in accordance with *Monell,* and there is no contrary factfinding by the district court. Moreover, this effort by the Petitioners fails to recognize that this Court simply does not sit to resolve purported disputes regarding the facts. *United States v. Johnson,* 268 U.S. 220, 227 (1925); *Texas v. Mead,* 465 U.S. 1041 (1984) (Stevens, J.).

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[5] (3) Other Felonies Where Deadly Force is Authorized After all reasonable means of preventing or apprehending a suspect have been exhausted, DEADLY FORCE is authorized in the following crimes:

(a) Kidnapping
(b) Murder in the 1st or 2nd degree
(c) Manslaughter
(d) Arson (Including the use of firebombs)
(e) Rape
(f) Assault and battery with intent to carnally know a child under 12 years of age
(g) Assault and battery with intent to commit rape
(h) *Burglary in the 1st, 2nd, or 3rd degree*
(i) Assault to commit murder in the 1st or 2nd degree

Garner v. Memphis Police Depart., (Pet. App., A.15) (Emphasis in original)

CONCLUSION

For all the forgoing reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED

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